BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18-1281

COMPETITIVE ENTERPRISE INSTITUTE, ET AL.,

APPELLANTS,

V.

FEDERAL COMMUNICATIONS COMMISSION,

APPELLEE.

ON APPEAL FROM ORDERS OF THE FEDERAL
COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

Appellants are the Competitive Enterprise Institute, John France, Daniel Frank, Jean-Claude Gruffat, and Charles Haywood. Appellee is the Federal Communications Commission (FCC).

2. Rulings under review.

The rulings at issue are the *Applications of Charter Communications, Inc., Time Warner Cable Inc. and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, 31 FCC Rcd 6327 (2016) (*Order*) (JA__), and the Order on Reconsideration in the same proceeding, 33 FCC Rcd 8915 (2018) (*Reconsideration Order*) (JA__).

3. Related cases.

Appellants filed a petition for mandamus in Case No. 17-1261 to compel the Commission to issue a decision on their then-pending petition for agency reconsideration. This Court dismissed that case as moot after the Commission issued the *Reconsideration Order*. The FCC is not aware of any other related cases pending in this Court or any other court.

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GLOSSARY

CEI	Competitive Enterprise Institute
FCC	Federal Communications Commission
Order	*Applications of Charter Communications, Inc., Time Warner Cable Inc. and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, 31 FCC Rcd 6327 (2016)
Reconsideration Order	*Applications of Charter Communications, Inc., Time Warner Cable Inc. and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order on Reconsideration, 33 FCC Rcd 8915 (2018).

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JURISDICTION

The *Reconsideration Order* (JA__) was released on September 10, 2018. Appellants filed their notice of appeal on October 9, 2018, within the applicable thirty-day filing period. *See* 47 U.S.C. § 402(c). Appellants invoke 47 U.S.C. § 405(b)(2) to support this Court's jurisdiction. But as discussed below, the Court lacks jurisdiction because appellants lack standing.

INTRODUCTION

In 2016, the Federal Communications Commission approved the transfer of radio licenses associated with the proposed merger of three cable operators into a new entity called New Charter, subject to certain conditions to ensure the

transaction served the public interest. *Orde*r, 31 FCC Rcd 6327 (2016) (JA__). The three cable operators accepted those conditions, the merger was consummated, and compliance with the conditions is well underway. The Competitive Enterprise Institute (CEI) and four New Charter customers filed a petition for agency reconsideration asking the Commission to eliminate the conditions it had placed on New Charter in approving the transaction. The FCC determined that CEI and the New Charter customers lacked standing to challenge the *Order*, and hence dismissed the petition. *Reconsideration Order*, 33 FCC Rcd 8915 (2018) (JA__).

The only issue before this Court on appeal is whether the Commission correctly dismissed the petition for reconsideration on standing and procedural grounds. Because the Commission did not address appellants' substantive arguments, the merits of those challenges are not before the Court.

As shown below, none of the individual New Charter customers have standing to appeal the Commission's orders, nor have they demonstrated that the Commission erred in rejecting their petition for reconsideration on procedural grounds. Nor has CEI shown that it has associational standing to bring this case. The appellants' failure to demonstrate standing deprives the Court of jurisdiction and, hence, the Court should dismiss this appeal.

QUESTIONS PRESENTED

1. Whether the individual New Charter customers have standing when they have not shown that any increase in their monthly broadband bills was caused by the merger conditions, or that their injury would be redressed if the conditions were lifted.

2. Whether CEI has associational standing to sue when it has not demonstrated that it is a membership organization or the functional equivalent of a membership organization, and in any event the lone member it identifies lacks standing in his individual capacity.

3. Assuming the individual New Charter customers have standing, whether the Commission reasonably dismissed their petition for agency reconsideration on procedural grounds.

STATUTES AND REGULATIONS

The relevant statutes and rules are set forth in an addendum to this brief.

COUNTERSTATEMENT

1. Statutory and Regulatory Framework. The Communications Act of 1934 (Act), as amended, 47 U.S.C §§ 151 *et. seq.*, requires the Commission to review applications to transfer control of radio licenses, such as those that accompany the mergers of communications companies. 47 U.S.C. § 310. The heart of that mandate, Section 310(d), prohibits a proposed license transfer unless the FCC determines that the transfer serves "the public interest, convenience, and

necessity." *Id*. § 310(d). In deciding whether a transaction meets these criteria, the Commission first assesses whether "the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules." *Order*, 31 FCC Rcd at 6336 ¶ 26 (JA__). If the FCC finds that the proposed transaction would not violate a statute or rule, the Commission then "employ[s] a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits." *Id*.

The Commission has used its public interest authority to impose and enforce transaction-specific conditions, where the Commission has deemed such conditions necessary to ensure that the public interest is served by the transaction. Section 303(r) of the Communications Act empowers the Commission to "prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out the provisions of [the Act.]" 47 U.S.C. § 303(r). Similarly, Section 214(c) of the Act authorizes the Commission to attach "such terms and conditions as in its judgment the public convenience and necessity may require." *Id*. § 214(c).

2. The Application For Approval to Transfer Radio Licenses. In May 2015, Charter Communications, Inc. (Charter), Time Warner Cable Inc. (Time Warner Cable), and Advance/Newhouse Partnership (Advance/Newhouse) agreed to merge into a new entity called New Charter. *Order*, 31 FCC Rcd at 6333 ¶ 18 (JA__). Following the transaction, New Charter would own or manage systems

serving approximately 23.9 million customers across 41 states, including 19.4 million broadband customers. *Id*. at 6334 ¶ 23 (JA__). One month later, to effectuate the merger, Charter, Time Warner Cable, and Advance/Newhouse filed an application with the Commission for approval to transfer control of certain radio licenses. *Id*. at 6335 ¶ 24 (JA__). The Commission subsequently sought public comment on the application, receiving thousands of comments and other filings in the proceeding. *Id*.

3. *Order*. In May 2016, the Commission approved the application by a 3-2 vote. Because the Commission determined that the transaction would "materially alter the Applicants' incentives and abilities in ways that are potentially harmful to the public interest," the Commission's approval was contingent on New Charter agreeing to comply with certain conditions. *Id*. at 6330 ¶ 7 (JA__). The Commission: (1) prohibited New Charter from "imposing data caps or charging usage-based pricing for its residential broadband service" for seven years after the transaction closed, *id*. ¶ 9 (JA__); (2) required New Charter to offer settlement-free interconnection to large IP networks for seven years after the transaction closed, *id*. at 6540 ¶¶ 1-2 (JA__); (3) required New Charter to build out its network to offer broadband Internet access service "capable of providing at least a 60 Mbps download speed to at least two million additional mass market customer locations within five years of [the transaction closing]," *id*. at 6506 ¶ 388 (JA__); and (4)

required New Charter to operate a "low income broadband program" that offers broadband service at a discounted rate to those who meet specific eligibility requirements. *Id*. at 6529 ¶ 453 (JA__). Subject to these conditions being met, the Commission determined that approving the proposed transaction "overall would be in the public interest." *Id*. at 6530 ¶ 455 (JA__).[1]

The three cable operators accepted the conditions, and the merger was consummated. Letter from John L. Flynn, Counsel for Charter Communications, Inc. to Secretary Marlene H. Dortch (June 17, 2016) (JA__). New Charter has been complying with the conditions since the merger was consummated. *See, e.g.*, Independent Compliance Officer's Fifth Report on Charter's Compliance with the Residential Build-Out and Data Caps and Usage-Based Pricing Conditions at 2, 14 (Redacted Public Version) (Jan. 15, 2019) (concluding that Charter is "on track to satisfy the terms of the [build-out] condition," which requires Charter expanding broadband service to at least 1.2 million customers by the end of 2019) (JA__); Charter Communications, Inc. Semi-Annual Report on Discounted Broadband Services Offer at 1 (Redacted Public Version) (Jan. 31, 2019) (Charter offering

[1] Then-Commissioner (now Chairman) Pai dissented in full, and Commissioner O'Rielly dissented in part, objecting to the conditions the Commission placed on its approval of the license transfers.

discounted broadband service to low-income families as of November 10, 2016) (JA__).

4. Petitions for Administrative Reconsideration. In June 2016, CEI and four New Charter broadband customers filed a petition for reconsideration asking the FCC to remove the conditions it imposed on New Charter. They argued that the conditions were contrary to the public interest, exceeded the agency's statutory authority, and were issued without affording the public adequate notice and a meaningful opportunity to comment. CEI Petition for Reconsideration at 1-2 (JA__).

5. The *Reconsideration Order*. On September 10, 2018, the Commission issued an order dismissing CEI and the customers' petition for reconsideration. *Reconsideration Order*, 33 FCC Rcd 8915 (2018) (JA__).[2]

First, the Commission explained that "neither CEI nor any of the four individual Petitioners who claim to be injured by the conditions placed on the license transfers specifically objected to the conditions about which they now complain." *Id.* ¶ 2 (JA__). And the individual Petitioners had not "participated

[2] CEI and the New Charter customers had filed a petition for a writ of mandamus in this Court on December 12, 2017, seeking to force the Commission to rule on their petition for reconsideration. This Court dismissed that petition after the Commission issued the *Reconsideration Order*. Case No. 17-1261, Dkt. No. 22, Per Curiam Order (Sept. 13, 2018).

previously in the proceeding, nor did they provide any reasons … for why they did not." *Id.* The Commission held that the petitioners were thus precluded from raising their objections to the merger conditions for the first time on reconsideration. *Id.*; *see* 47 C.F.R. § 1.106(c).

Second, the Commission held as an independent ground for dismissing the petition that CEI and the customers lacked standing to challenge the *Order*. CEI lacked standing, the Commission concluded, because it had not alleged any "injury in its own right," nor had it made any showing that it had associational standing. *Reconsideration Order*, 33 FCC Rcd at 8916 ¶ 3 (JA__). The agency explained that CEI had not established that it is a membership organization, nor that—even if it were—any of the individual New Charter customers were members of it. *Id.* And the four New Charter customers had not shown that they "have suffered any cognizable injury stemming from the conditions at issue." *Id.* at 8918 ¶ 6 (JA__).

6. CEI and the New Charter customers filed their notice of appeal on October 9, 2018.

SUMMARY OF ARGUMENT

I. The Court should dismiss the appeal because neither the individual New Charter customers nor CEI have standing.

A. Customer Jean-Claude Gruffat's claim of standing fails at the outset. He does not allege that his monthly broadband bill increased or otherwise changed

after the merger. Instead, he makes vague and unsupported allegations that New Charter's prices could increase and that the quality of his service could decrease in the future. In the absence of a concrete injury, Mr. Gruffat lacks standing.

The other three customers allege that their monthly broadband bills increased after the merger, but they cannot establish causation—that their bills increased *as a result of* the conditions placed on New Charter. Appellants' burden is "substantially more difficult" to meet where, as here, appellants' injuries result from the independent actions of a third party not before this court. *Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 49 (D.C. Cir. 2016). New Charter, whose independent pricing decisions impact the individual appellants, is not a party to this litigation. Appellants attempt in vain to demonstrate causation by relying on a declaration from economist Dr. Crandall and individual statements from Commissioners. But Dr. Crandall's declaration is replete with speculation and couched in caveats. And as this Court has consistently held, individual Commissioner statements do not constitute agency actions and do not represent the Commission's views.

Nor can these three customers demonstrate redressability—that their bills would decrease if the Commission were to lift the conditions (or if the Court were to strike them down). New Charter—not the Commission—controls the broadband prices it charges its customers. Because the Commission does not regulate

broadband internet access rates, it has no say over the broadband prices New Charter elects to charge; and there is no reason to presume that New Charter would reduce its rates were the conditions lifted. Indeed, this Court has rejected claims of standing where, as here, a third party controls the rates charged to customers.

B. CEI does not have associational standing. The only "member" that it identifies—Mr. Gruffat—does not himself have standing, thus defeating any claim to associational standing. But even were Mr. Gruffat to have standing, CEI nonetheless would not. CEI does not purport to be a traditional membership association. An organization that has no members may nonetheless assert associational standing if it is the "functional equivalent of a traditional membership organization." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-45 (1977); *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) (*ALF*). But CEI does not attempt to make this showing, and even if it had, it would not meet the three-part test. CEI has not shown that it serves a discrete, stable group of persons with a common set of shared interests, that its supporters help guide the organization's activities, or that there is a link between the outcome of this litigation and its supporters.

II. In addition to not having standing, the Commission reasonably dismissed the individual customers' petition for a second, independent reason—failure to participate earlier in the agency proceeding. The customers did not file any

comments in the underlying proceeding, nor did they provide a good reason in their reconsideration petition why they had not done so. The Commission's rules are clear that dismissal is appropriate under such circumstances. *See* 47 C.F.R. § 1.106(b)(1).

STANDARD OF REVIEW

The Court reviews *de novo* whether appellants have standing to challenge the orders on review. *E.g.*, *Equal Rights Ctr. v. Post Props. Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011).

In addition, appellants bear a heavy burden to establish that the orders are "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the orders are entitled to a presumption of validity. *E.g.*, *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). The Court must uphold a rule if the Commission "examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016).

ARGUMENT

I. APPELLANTS LACK ARTICLE III STANDING TO BRING THIS APPEAL.

A showing of standing "is an essential and unchanging predicate to any exercise of [the Court's] jurisdiction." *Am. Chemistry Council v. Dep't. of*

Transp., 468 F.3d 810, 814 (D.C. Cir. 2006) (internal quotations omitted). The "irreducible constitutional minimum of standing contains three elements: (1) the plaintiff must demonstrate an injury-in-fact, (2) there must be a causal connection between the injury and the conduct challenged, and (3) it must be likely that the injury will be redressed by a favorable decision." *Sorenson Commc'ns. v. FCC*, 897 F.3d 214, 224 (D.C. Cir. 2018) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

Appellants' burden in this case is even greater than normal because New Charter is not a party to this litigation, and appellants' alleged injuries come from New Charter's purported decision to raise its rates and to (potentially) invest less in appellants' service in the future. As this Court has held, it is "substantially more difficult" to establish standing where, as here, "the existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts []." *Am. Freedom Law Ctr.*, 821 F.3d at 48-49 (citing *Lujan*, 504 U.S. at 562).

Indeed, this Court has only "occasionally" found the requirement of standing to be satisfied in cases challenging government action where the alleged injury depends on third-party conduct. *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004), *cert. denied* 545 U.S. 1104, *abrogation on*

other grounds recognized by Perry Capital LLC v. Mnuchin, 864 F.3d 591 (D.C. Cir. 2017). These cases fall into two categories, neither of which apply here.

First, this Court has found a party to have standing to challenge government action that authorizes third party conduct that would "otherwise be illegal in the absence of … government action." *Nat'l Wrestling Coaches*, 366 F.3d at 940; *see also Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998). Here, though, there is no allegation in the record that the prices New Charter charges its customers are illegal. Moreover, while the Commission imposed the conditions on New Charter, it did not impose the alleged increased broadband prices about which appellants complain. The Commission does not regulate the prices New Charter charges its customers for broadband internet access. *See infra* p. 20.[3]

Second, parties can have standing to challenge government action on the basis of injuries caused by third parties "where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress."

[3] While the Commission adopted a condition prohibiting New Charter from charging usage-based pricing for its residential broadband service, *Order*, 31 FCC Rcd at 6543 (JA__), the Commission does not control the specific prices New Charter charges its customers.

Nat'l Wrestling Coaches Ass'n, 366 F.3d at 941. As explained below, there is no evidence of such a causal relationship here, much less "substantial evidence."

Appellants thus cannot meet their heavy burden to demonstrate standing.

A. The Individual New Charter Customers Lack Standing.

Turning first to the individual appellants, their claims of standing fail. One of the New Charter customers, Jean-Claude Gruffat, does not even allege a concrete injury on his own behalf; he does not claim that his monthly broadband bill increased after the merger. Declaration of Jean-Claude Gruffat, A-24. The three other New Charter customers allege that their monthly broadband bills increased by $4, $17, and $20, respectively, after the merger. *See* Declaration of Daniel Frank, A-23; Declaration of Dr. John France, A-21; Declaration of Charles Haywood, A-26. But the customers do not make the critical showing of causation—that their bills increased *as a result of* the conditions imposed on New Charter—or redressability—that their bills would likely decrease if the challenged conditions were lifted.

1. The Customers' Alleged Injuries Are Not Fairly Traceable to the Merger Conditions.

The causation or "traceability" element of standing looks to "whether it is substantially probable that the challenged acts of the defendant, *not of some absent third party*, will cause the particularized injury of the plaintiff." *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (emphasis added). Appellants

allege that their injury—the increase in their monthly broadband bills and the potential that New Charter may "invest[] less in improving [their] service"[4]—is caused by the merger conditions that the Commission placed on New Charter, an absent third party. But that allegation is based merely on speculation. Absent a basis for showing the *Commission* is responsible for their alleged injuries, appellants lack standing.

Appellants rely primarily on a declaration from economist Dr. Robert Crandall, who opines that the merger conditions are "likely" to harm some or all existing Charter subscribers "by either reducing the quality of the services they receive or raising their cable rates []." Declaration of Robert W. Crandall ¶ 4, A-27-28. But Dr. Crandall is comparing appellants' rates to the wrong baseline—a company that merged without agreeing to any conditions, rather than the pre-merger companies. Furthermore, broadband providers, including the cable companies here, adjust their rates for any number of reasons. Dr. Crandall does not demonstrate that, or even explain how, the challenged conditions caused New Charter to increase appellants' bills—as compared to increased programming costs, increased fixed costs or other costs, or even decreased competition as a result

[4] Gruffat Decl., A-24; Frank Decl., A-23; France Decl., A-21; Haywood Decl., A-26.

of the merger itself. These types of "independent intervening or additional causal factors" defeat standing. *Fulani v. Brady*, 935 F.2d 1324, 1329 (D.C. Cir. 1991).

Furthermore, Dr. Crandall's assertions are speculative and couched in caveats. For example, with respect to the build-out requirement, he explains that "[w]ere any of this capital expenditure diverted to building out its network to areas that [New Charter] has not considered remunerative, such diversion would reducer [sic] Charter's ability to finance network upgrades to its existing plant []." Crandall Decl. ¶ 7, A-28. But as Dr. Crandall himself concedes, it is unknown whether New Charter will divert expenses in this manner. *Id*. In any event, large corporations like New Charter often shift their priorities and reallocate resources to new projects, without sacrificing service to their customers.

As for the condition on the low-income broadband program, Dr. Crandall claims that "[i]t is unlikely that the $14.99 per month low-income broadband offering would cover the full costs of offering … service." *Id*. at ¶ 8, A-28. Therefore, Dr. Crandall opines, the program would "reduce Charter's cash flows from its existing and expanded footprints," thereby reducing its ability to "fund improvements in its existing network" and resulting in poorer "service quality for its existing customers." *Id*. at ¶¶ 8, 9, A-28. But Dr. Crandall is merely speculating ("it is unlikely") that New Charter cannot recoup its full costs—let alone its marginal costs—at the agreed-upon rate. Further, the suggestion that a

sophisticated, multibillion-dollar company like New Charter would no longer be able to offer quality service to its other customers, like appellants, because of the addition of this one program is not just speculative but highly dubious. Many service providers offer discounted service to low-income customers to help promote subscribership in underserved areas. Indeed, one of the merger applicants, Advance/Newhouse, offered such a program for low-income customers well before the merger. *Order*, 31 FCC Rcd at 6529 ¶ 452 (JA__). Another merger applicant, Time Warner Cable, offered an "Everyday Low Price" broadband offering of $14.99 per month to *all* subscribers. *Id*. at 6528, n.1482 (JA__). Nothing in the record suggests that these companies offered discounted plans at the expense of compromising service. Thus, while it is true—as appellants stress (Br. 40)—that the Court credits allegations that are "firmly rooted in the basic laws of economics," *United Transp. Union v. ICC*, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989), the Court has also been clear that it is not compelled to "accept allegations founded solely on the complainant's speculation." *Id*. That is all appellants have here.

The cases on which appellants rely to demonstrate traceability are also all inapposite. They discuss *Consumer Federation of America v. FCC*, 348 F.3d 1009 (D.C. Cir. 2003) to "further demonstrate[] causation" (Br. 40) in this case. But as this Court subsequently observed in *National Wrestling Coaches*, 366 F.3d at 940,

that case involved government action allowing third-party conduct that would otherwise have been prohibited. *See Consumer Fed'n of Am.*, 348 F.3d at 1012 (had FCC imposed conditions on merger sought by plaintiff, third party could not have engaged in challenged conduct). As explained above, *supra* at 13, that is not this case. There is nothing in the record to suggest that the prices New Charter charges its customers would have been illegal or prohibited but for the merger approval. Moreover, the Commission required *conditions*, not an increase in broadband prices. Indeed, *Consumer Federation* is in fact important here, but not for the reason appellants give. While the Court ultimately found the appellants to have standing on another basis, it *rejected* the appellants' claim of standing based on their contention that their cable rates had risen since the merger was approved: "While this is certainly an injury-in-fact, the [appellants] make no attempt to show how this injury can be traced to the merger or—much the same thing—how it could be redressed by undoing the merger." *Consumer Fed'n of Am.*, 348 F.3d at 1012.

Appellants' reliance on *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001) (Br. 38, 41) is also misplaced. In that case, the evidence of causation was "formidable." *Nat'l Wrestling Coaches*, 366 F.3d at 942 (describing *Tozzi*). In *Tozzi*, this Court held that a manufacturer of medical supplies made of PVC plastic had standing to challenge the government's decision

to list the chemical dioxin as a "known" carcinogen. 271 F.3d at 308-10. As this Court subsequently observed, the record in *Tozzi* left "little doubt" with respect to causation, since plaintiff had submitted "affidavits and other record evidence demonstrating that municipalities and health care organizations opted to phase out their use of PVC plastic as a direct result of the Secretary's decision." *Nat'l Wrestling Coaches*, 366 F.3d at 941 (citing *Tozzi*, 271 F.3d at 308-09).

Here, in contrast, the evidence falls far short of "formidable." Rather, appellants rely primarily on a single declaration from Dr. Crandall that is rife with speculation. Nothing in Dr. Crandall's declaration demonstrates that appellants' monthly bills increased *as a result of* the merger conditions—and one of the appellants, Mr. Gruffat, does not even allege that his monthly broadband bill increased or otherwise changed after the merger. Nor does Dr. Crandall's declaration demonstrate that appellants' service will be negatively affected by those conditions.

Finally, the Court's decision in *CEI v. Nat'l Highway Safety Traffic Admin.*, 901 F.2d 107, 122 (D.C. Cir. 1990) is distinguishable because in that case, the court found "overwhelming evidence" of a causal connection based on the "agency's own factfinding." *Id.* at 114, 117. The Court pointed to substantial evidence from the agency's numerous rulemakings, as well as public comments. *Id.* at 115. Here, on the other hand, appellants refer solely to dissenting statements

from two Commissioners contending that the conditions could lead to higher prices. (Br. 39). But this Court has emphasized that individual Commissioner statements are not "institutional Commission actions" and "do not represent the Commission's views." *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007). Therefore, they cannot accurately be characterized as part of the "agency's own factfinding." *CEI*, 901 F.2d at 114.

2. The Customers' Alleged Injuries Are Not Redressable By a Favorable Court Decision.

Because appellants cannot show that their injury is fairly traceable to the merger conditions, the Court's inquiry can end here. *See U.S. Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000) (a "deficiency on any one of the three prongs suffices to defeat standing."). In any event, appellants lack Article III standing for the additional reason that they cannot demonstrate that it is likely, as opposed to speculative, that their purported injury will be redressed if the conditions were lifted.

Appellants cannot show that a lifting of the conditions would redress their injury because New Charter—not the Commission—determines the broadband prices it charges its customers. The Commission does not regulate the prices New Charter charges its customers for broadband internet access. Indeed, the Commission expressly disclaimed any interest in regulating New Charter's prices. The agency explained that "we find value in Charter's ability to set its own pricing

policy, and reject commenters' request to adopt this specific pricing policy as a condition of the transaction." *Order*, 31 FCC Rcd at 6500 ¶ 372 (JA__).

This Court and other circuits have rejected similar claims of standing where a third party, not the government entity being sued, controls the rates charged to customers. In *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735 (D.C. Cir. 2008), an electricity consumer alleged that its costs had risen by more than 1000% because of a licensing decision by FERC. *Id*. at 738. This Court held that the customer lacked standing because state utility commissions, not FERC, controlled retail rates. *Id*. at 739. Therefore, the consumer "offered no reason to believe" that a different decision from the federal agency would lead the utilities to lower their rates. *Id*. at 736.

Similarly, in *Northern Laramie Range Alliance v. FERC*, 733 F.3d 1030 (8th Cir. 2013), the U.S. Court of Appeals for the Eighth Circuit held that an advocacy group had failed to show that the electricity rates of its members would decrease if FERC's decision were reversed. The Court pointed out that the "rates depend on the actions of third parties, those of the utility and the state regulatory commission," *id.* at 1032, and that there was no "knowing whether the [state] Commission would revisit the rates already approved." *Id*. at 1038. The Court concluded that the appellants "assume[] future rates and actions by third parties that we cannot predict with any reasonable measure of comfort." *Id*. at 1039. *See*

also Burton v. Cent. Interstate Low-Level Radioactive Waste, 23 F.3d 208, 210 (8th Cir. 1994) (ratepayers lacked standing where "[a]ppellants apparently would have us take it on faith that LES, which is not a party to this action, would adjust its rates if the district court enjoined" the Commission's decision); *Starbuck v. City & County of SF*, 556 F.2d 450, 458 (9th Cir. 1977) (ratepayers alleging an increase in their rates lacked standing because they had not "made any showing that their rates would decrease if they were successful in this action.").

Appellants' claims are analogous to those raised in *Klamath*, *Northern Laramie*, and similar cases because appellants' alleged injury, an increase in their monthly broadband bills, stems from prices that are not in any way set or regulated by the Commission. Because New Charter—which is not a party to this litigation—sets customers' prices, it is wholly speculative that a favorable decision by this Court would lead New Charter to reduce its prices. *See West v. Lynch*, 845 F.3d 1228, 1237 (D.C. Cir. 2017) ("When conjecture is necessary, redressability is lacking."). As in *Northern Laramie*, appellants here are asking the Court to "assume[] future rates and actions by third parties that we cannot predict with any reasonable measure of comfort." 733 F.3d at 1039. Appellants provide no basis for the Court to make such an assumption.

Indeed, redressability is all the more speculative because Charter was already in the process of implementing versions of the conditions of its own

accord.[5] And as discussed above, one of the pre-merger companies already had a discounted broadband plan for low-income customers, and another had a generally available broadband plan at the same rate—$14.99—that the fourth condition mandated be made available to low-income customers. *Order*, 31 FCC Rcd at 6529 ¶ 452 (JA__); 6528, n.1482 (JA__). This Court has rejected claims of standing under similar circumstances. *See, e.g.*, *Chamber of Commerce v. EPA*, 642 F.3d 192, 206 (D.C. Cir. 2011) (no redressability where third party's public statements suggested that it would implement technology to continue to meet California's emission standards, "even in the absence of regulatory compulsion").

In support of redressability, appellants cite to a separate statement from a Commissioner and Dr. Crandall's declaration. (Br. 41). But as explained, individual Commissioners' statements do not represent the agency's views, *Sprint Nextel Corp.*, 508 F.3d at 1132, and thus do not support appellants' claim. And Dr.

[5] For example, the first condition prohibits New Charter from "imposing data caps or charging usage-based pricing for its residential broadband service" for seven years. *Order*, 31 FCC Rcd at 6330 ¶ 9 (JA__). But in seeking FCC approval of the transaction, the applicants informed the Commission that they had already "committed to refrain from implementing data caps or [usage-based pricing] for three years." *Id*. at 6364 ¶ 78 (JA__). The second condition, which required New Charter to offer settlement-free interconnection to large IP networks for seven years, was also an extension of the applicants' own plans. Charter had already adopted in July 2015 a "new interconnection policy that enables third parties to interconnect with it through settlement-free peering" if they meet certain prerequisites. *Id.* at 6390 ¶ 133 (JA__). *See generally* Case. No. 17-1261, Dkt. No. 6, FCC Opposition to Mandamus Petition at 13-14 (May 25, 2018).

Crandall confines his discussion on redressability to one sentence: He asserts without explanation that "the removal of some or all of these conditions would reduce the magnitude of these harms." Crandall Decl. ¶ 12, A-29. This brief, conclusory assertion plainly fails to rise to the "substantial evidence" required to establish a likelihood of redress when challenging government action based on third-party conduct.

B. CEI Lacks Associational Standing.

CEI claims that it has associational standing to sue on behalf of Mr. Gruffat. *See* Br. 16 ("Based on Gruffat's individual standing, CEI has organizational standing."). It does not.

The threshold requirement for an organization to demonstrate associational standing is to "establish that at least one identified member has . . . standing to pursue [its] challenge." *Am. Chemistry Council*, 468 F.3d at 818; *Sorenson*, 897 F.3d at 224 (members must have standing to sue in their own right). That is to say, CEI must show that at least one of its members was injured-in-fact, that the injury was caused by the orders on review, and that the Court can redress the injury. CEI must then also demonstrate that "(2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Sorenson*, 897 F.3d at 224 (internal quotation marks omitted).

CEI lacks associational standing because it has failed to identify any individual member who would have standing to sue on his or her own behalf. But even had CEI identified such a person, its assertion of associational standing nonetheless fails because it has not demonstrated that it is either a membership organization or the "functional equivalent" of a traditional membership organization, *Hunt*, 432 U.S. at 342.

1. CEI Has Not Identified Any Member With a Concrete Injury-In-Fact.

CEI claims that Mr. Gruffat, who serves as a director on its board, is a "member" of the organization for purposes of associational standing. (Br. 41). But Mr. Gruffat lacks standing in his own right because he does not allege a concrete injury. As explained above, *supra* at 14, Mr. Gruffat does not contend that his monthly broadband bill increased after the merger. Instead, he asserts generally that "I … think that the costs and conditions of the FCC's Order are likely to make my Charter service worse and/or more expensive, because they are likely to result in Charter charging me higher prices—and investing less in improving my service—than it otherwise would." Gruffat Decl., A-24. But Mr. Gruffat does not allege that his service *actually* became worse or that New Charter *actually* charged him higher prices. His vague and unsupported predictions of potential future developments are wholly insufficient to establish that he has suffered an injury-in-fact. *See Sorenson*, 897 F.3d at 225 (association lacked

standing where it failed to demonstrate that the Commission's order "adversely affected [the only identified member's] service, costs … or … rates" in an "individualized way.").

Mr. Gruffat's injury is thus clearly distinguishable from the circumstances in *Action on Smoking & Health v. Dep't of Labor*, 100 F.3d 991 (D.C. Cir. 1996) (*ASH*), on which CEI relies (Br. 42-43). In that case, the Court concluded that the chairman of the board of a charitable trust had standing because "he is exposed to secondhand tobacco smoke and suffers from its effects." *Id*. at 992. Here, in contrast, Mr. Gruffat's injury is neither concrete nor particularized. Therefore, CEI has failed to show that its "member[] would otherwise have standing to sue in [his] own right."[6] *Sorenson*, 897 F.3d at 224.

2. CEI Is Not the Functional Equivalent of a Traditional Membership Organization.

Even if Mr. Gruffat were to have standing in his individual capacity, CEI would nonetheless lack standing here because it has not demonstrated that it is a membership organization or its functional equivalent.

[6] CEI does not claim to have standing in its institutional capacity; indeed, it does not allege any injury on its own behalf. Having not raised this argument in its opening brief, appellants cannot do so in their reply. *See, e.g.*, *Am. Wildlands v. Kempthorne*, 530 F.3d 991 (D.C. Cir. 2008) (plaintiffs forfeited argument where it was raised for the first time in their reply brief).

CEI does not claim to be a traditional membership organization for purposes of associational standing. *Cf.* Br. 42-43. Indeed, it plainly is not: CEI's website gives no indication that it is a membership organization, nor does the website provide any information on how one can become a member. *See* Competitive Enterprise Institute website, www.cei.org (last visited Mar. 13, 2019). The website merely invites interested individuals to "follow" the organization on Twitter, Facebook and other social media, but this alone does not constitute membership for purposes of associational standing. *See Sorenson*, 897 F.3d at 225 (passive subscribers to organization's email list and individuals who followed group's Facebook page could not be invoked as members to satisfy associational standing).

To be sure, an organization that has no members may nonetheless assert associational standing provided that it is "the functional equivalent of a traditional membership organization." *Hunt*, 432 U.S. at 342; *ALF*, 808 F.2d at 89. But CEI does not even attempt to make this showing.[7] Rather, all it asserts is that Mr. Gruffat is on CEI's Board. But that is plainly not enough; all sorts of entities have boards, and no one would claim that, for example, a for-profit corporation can assert associational standing based on an injury to an independent member of its board.

[7] It is thus precluded from doing so for the first time on reply. *See, e.g. Am. Wildlands*, 530 F.3d at 992.

In any event, even if CEI were to attempt to make the showing that it is the functional equivalent of a membership organization, it would fail the three-part test. First, CEI does not identify a "discrete, stable group of persons" that it serves. *ALF*, 808 F.2d at 90. Aside from Mr. Gruffat, CEI does not even identify any other member of its organization. Second, CEI has not shown that Mr. Gruffat or any other supporters select the organization's leadership, activities, or help finance such activities. *Id.*; *see also Sorenson*, 897 F.3d at 225. And third, CEI has not shown any "linkage between [its] interest in the outcome of this kind of litigation and those of its supporters." *Id.* CEI does not allege that all or even most of its supporters are New Charter customers, nor is it likely that they would be. *See Telecomms. Research & Action Ctr. v. Allnet Commc'n Serv.*, 806 F.2d 1093, 1096 (D.C. Cir. 1986) (no associational standing where organization "ha[d] identified only a handful—five or six—of its 12,000 members with a concrete stake in the outcome."). Given that CEI alleges only that one of its members is a New Charter customer, CEI "cannot pretend to represent the large group of similarly situated [New Charter] subscribers." *Id.* at 1097. Taken together, CEI's relationship to its supporters bears "none of the indicia of a traditional membership organization." *ALF*, 808 F.2d at 90, and CEI's claim of associational standing fails.

ASH, 100 F.3d 991, on which CEI relies (at 42-43), is not to the contrary. The Court in *ASH* did, to be sure, find associational standing based on injury to the

chairman of the board of trustees of a charitable trust. *Id.* at 992. But in so holding, the *ASH* Court relied on *Hunt*, *see id.*, and in no way suggested that *any* organization would automatically be entitled to sue based on injury to a board member. Rather, the *ASH* Court implicitly engaged in precisely the analysis that the Supreme Court mandated in *Hunt*, discussing for example the mission of ASH and whether the alleged injury to the chairman was "'germane to the organization's purpose.'", *id.* at 991-992 (quoting *Hunt*, 432 U.S. at 343). Here, although CEI has asserted that Mr. Gruffat serves on its board, it has done nothing more to demonstrate that it is the "functional equivalent" of a membership organization.

II. THE COMMISSION REASONABLY DISMISSED THE PETITION FOR RECONSIDERATION OF THE FOUR INDIVIDUAL NEW CHARTER CUSTOMERS FOR FAILURE TO PARTICIPATE EARLIER IN THE PROCEEDING.

Even if the Court were to conclude that the four individual New Charter customers have standing, the Court should deny their petition for review because the Commission reasonably dismissed their petition for reconsideration for a second, independent reason: these petitioners had not previously participated in the proceeding by filing comments with the agency, and did not even attempt to provide any reason why they could not have done so. *Reconsideration Order*, 33 FCC Rcd at 8916 (JA__). Instead, they challenged the conditions imposed on New Charter for the first time on reconsideration.

This Court has "repeatedly held that [47 U.S.C. § 405] codifies time-honored exhaustion principles, including the general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Nw. Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) (internal quotation marks and citations omitted)

Here, the Commission's rule implementing Section 405 is clear: "If [a petition for reconsideration] is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1). The individual customers did not even attempt to meet that standard in their petition for reconsideration. *Reconsideration Order*, 33 FCC Rcd at 8915-16 (JA__). The Commission therefore reasonably dismissed their petition. *See Virgin Islands v. Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993) (upholding Commission's dismissal of petition for reconsideration on procedural grounds); *Warren Havens v. FCC*, 424 F. App'x 3, 4 (D.C. Cir. 2011) (upholding Commission's dismissal of petitions for reconsideration based on failure to comply with 47 C.F.R. § 1.106(b)(1)).

Appellants conflate their substantive objection (to the conditions) with the question why they should be allowed to object having not previously participated in the proceeding. *See* Br. 32-33. And appellants conflate a Commission order arising from a rulemaking—in which the Commission issues a notice of proposed rulemaking delineating the issues under consideration—with an order arising from an adjudication, as in this case. In the ordinary course, entities that may have views on a transaction are expected to participate in the agency's proceeding on that transaction. Similarly, participants in an adjudication such as this one are reasonably expected to review other participants' comments and to reply to those comments by the deadline for responsive comments—that is the very reason why the agency provides not only for comments but also responses and replies to comments. *See Reconsideration Order*, 33 FCC Rcd at 8915-16 & n.4 (JA__). [8] Therefore, the Commission appropriately dismissed the petition for reconsideration with respect to the four individual New Charter customers.[9]

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[8] Because CEI's initial comments could be read as objecting to the imposition of *any* conditions, *see* Br. 33 n.7, the Commission does not press the argument on appeal that CEI—as opposed to the individual New Charter customers—was barred from challenging the New Charter conditions on reconsideration.

[9] Were the Court to determine that the Commission erred in dismissing appellants' petition for reconsideration, the appropriate remedy would be to remand to the Commission to consider appellants' substantive challenges to the merger conditions. Having dismissed appellants' reconsideration petition on standing grounds, the agency had no reason to reach their substantive challenges to the *Order*. And because the Commission did not address those substantive

CONCLUSION

Appellants' failure to demonstrate standing deprives the Court of jurisdiction to hear this case. The Court should therefore dismiss their appeal, or in the alternative dismiss the appeal of CEI and deny the appeal of the remaining appellants.

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arguments, they are not before the Court. *See e.g.*, *INS v. Ventura*, 537 U.S. 12, 16 (2002) ("A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.").

Appellants concede that the Commission did not "reach the merits of Appellants' challenge." (Br. 36). But they nevertheless assert that their challenge to the merger conditions is properly before this Court because the "FCC effectively ruled on them." (*Id*. at 34). This claim is baseless. Appellants point to the discussion of the conditions in the *Order* itself, as well as in individual statements from Commissioners. (*Id*. at 35-36). But while the Commission described the conditions in the *Order*, appellants' challenges to them were not ruled upon by the Commission. Nor does *Office of Communications of the United Church of Christ v. FCC*, 911 F.2d 803, 808 (D.C. Cir. 1990), suggest that the Court could address the merits of appellants' challenges. In *UCC*, the Commission dismissed a petition for reconsideration on procedural grounds, but *also* addressed the merits of that challenge. *Id*. at 807. (Indeed, because the Commission did not address appellants' substantive challenges to the merger conditions (Br. 16-31), we do not address those claims in this brief. *SEC v. Chenery Corp*., 318 U.S. 80 (1943)).

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March 14, 2019

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I, Thaila K. Sundaresan, hereby certify that on March 14, 2019, I filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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Statutory Addendum

47 U.S.C.A. § 214

Extension of lines or discontinuance of service; certificate of public convenience and necessity

(c) Approval or disapproval; injunction

The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

47 U.S.C.A. § 303

Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

47 U.S.C.A. § 310

License ownership restrictions

(a) Grant to or holding by foreign government or representative

The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof.

(b) Grant to or holding by alien or representative, foreign corporation, etc.

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by--

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(c) Authorization for aliens licensed by foreign governments; multilateral or bilateral agreement to which United States and foreign country are parties as prerequisite

In addition to amateur station licenses which the Commission may issue to aliens pursuant to this chapter, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of

Title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(d) Assignment and transfer of construction permit or station license

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

(e) Administration of regional concentration rules for broadcast stations

(1) In the case of any broadcast station, and any ownership interest therein, which is excluded from the regional concentration rules by reason of the savings provision for existing facilities provided by the First Report and Order adopted March 9, 1977 (docket No. 20548; 42 Fed. Reg. 16145), the exclusion shall not terminate solely by reason of changes made in the technical facilities of the station to improve its service.

(2) For purposes of this subsection, the term “regional concentration rules” means the provisions of sections 73.35, 73.240, and 73.636 of title 47, Code of Federal Regulations (as in effect June 1, 1983), which prohibit any party from directly or indirectly owning, operating, or controlling three broadcast stations in one or several services where any two of such stations are within 100 miles of the third (measured city-to-city), and where there is a primary service contour overlap of any of the stations.

47 C.F.R. § 1.106

Petitions for reconsideration in non-rulemaking proceedings.

(c) In the case of any order other than an order denying an application for review, a petition for reconsideration which relies on facts or arguments not previously presented to the Commission or to the designated authority may be granted only under the following circumstances:

(1) The facts or arguments fall within one or more of the categories set forth in § 1.106(b)(2); or

(2) The Commission or the designated authority determines that consideration of the facts or arguments relied on is required in the public interest.